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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1222

CHARLES L. WOLFF, JR., WARDEN, NEBRASKA PENAL AND CORRECTIONAL COMPLEX,

Petitioner,

vs.

DAVID L. RICE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE IN SUPPORT OF THE PETITIONER, OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., THE NATIONAL DISTRICT ATTORNEY'S ASSOCIATION, INC., AND THE ILLINOIS ASSOCIATION OF CHIEFS OF POLICE, INC.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF THE PETITIONER.

Americans for Effective Law Enforcement, Inc. The National District Attorney's Association, Inc., and The Illinois Association of Chief of Police, Inc. respectfully move this Court for leave to file a brief, *amici curiae*, in support of the petitioner in the instant case. This motion is made pursuant to Rule 42 of the Supreme Court Rules. The petitioner has consented to our filing; the respondent has not responded to our request for consent to file. Accordingly, we are moving the Court directly for leave to file. A letter from counsel for the petitioner has been filed with the Clerk of this Court. The interest of the *amici curiae* and our reasons for desiring to file are set forth below.

INTEREST OF THE AMICI CURIAE.

Americans for Effective Law Enforcement, Inc.—(AELE), is a national, not-for-profit, non-partisan, non-political organization incorporated under the laws of the State of Illinois. As stated in its by-laws, the purposes of AELE are:

1. To explore and consider the needs and requirements for effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives, AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and of police effectiveness in dealing with crime.

The National District Attorneys Asociation (NDAA) is a nonprofit, nonpolitical, tax exempt corporation composed of approximately 6,000 members representing all 50 states. The purposes of the National District Attorneys Association are, *inter alia,* to improve and to facilitate the administration of justice in the United States and to promote the study of law and legal institutions.

To effectuate these aims the National District Attorneys Association for many years has utilized an Amicus Curiae Committee to file briefs in cases of national importance in the United States Supreme Court. The NDAA seeks to make known the views of all prosecutors in America and to bring before this Court their position on matters affecting the discharge of the duties of prosecutor.

The Illinois Association of Chiefs of Police, Inc., is a not-for-profit Illinois association and consists of over 600 members who are Illinois police chiefs and senior law enforcement executives.

Each of the *amici* herein has an abiding interest in the effectiveness of law enforcemet in this country. The instant case presents questions of more than usual impact upon the effectiveness of law enforcement: the continued viability of the Exclusionary Rule; the extent to which Federal *habeas corpus* relief should be granted to state petitioners alleging claims of illegal search and seizure; and the permissible extent of police activity when the most exigent circumstances exist. Thus, each of the *amici* believes that it has a direct interest in the outcome of this case.

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BRIEF AMICI CURIAE IN SUPPORT OF THE PETITIONER.

SUMMARY OF ARGUMENT.

This case presents a firm factual and legal basis for this Court to decide the question of whether the Exclusionary Rule should be modified to permit the admission of evidence obtained by the police, in good faith, where exclusion of that evidence will have little or no deterrent effect on police misconduct.

Amici will not reiterate all of the arguments pro and con about the Exclusionary Rule; we will confine ourselves to the argument that logic and common sense dictate that the sanction of suppression of evidence does not, and can not, deter illegal

police conduct. We will then expand this argument to the facts of this case.

The Exclusionary Rule rests on two often enunciated judicial bases: 1) the "imperative of judicial integrity" requires the exclusion of tainted evidence, and; 2) the exclusion of illegally seized evidence will deter unlawful police conduct. With regard to the "imperative of judicial integrity" this Court only last term, refused to apply retroactively the line of cases which now prohibit roving border patrol searches, because the law enforcement officers involved acted in good faith reliance on a federal statute, *United States* v. *Peltier*, ____ U. S. ____, 95 S. Ct. 2313 (1974). The Court specifically rejected the judicial integrity argument. We argue, by analogy, that, when the police are acting in complete good faith, judicial integrity would not be offended by admitting the evidence in a case such as the instant case.

Insofar as the deterrence rationale of the Exclusionary Rule is concerned, we must look at the state of mind of the target of the Rule, the law enforcement officers themselves. First it must be pointed out that policeman go into most search and seizure situations laboring under three distinct disadvantages:

1. The law of search and seizure is so exceedingly complex and confusing that it is unrealistic to expect a policeman, untrained in the law, to be able to grasp it sufficiently to conduct himself in a flawless manner.
2. Policemen, in most cases, must make their decision whether or not to search in a matter of minutes or hours. They do not have the advantage of the months or even years available to reviewing courts to mull over the propriety of their conduct.
3. Policemen must make their decisions "on the street", that is, under the very real stresses and pressures of law enforcement work today.

Given these factors, a policeman about to embark on a conduct of search and seizure can have two, and only two, states of mind. He acts in bad faith, knowing that his conduct is illegal and that any evidence that he obtains will be suppressed, or he acts in the good faith belief that his conduct is lawful and that the evidence will not be suppressed.

The threat of suppression is obviously of no deterrent value against the officer who acts in bad faith for, by definition, he acted as he did *in spite of* that threat. The remedy for such conduct is a *direct* action against the errant officer and/or the entity which hired him and the trend, both in the legislatures and in the courts, is in the direction of such actions.

We submit that far and away the greatest majority of our law enforcement officers act in good faith when they make searches and seizures, but they do make mistakes. Logically, however, the threat of exclusion of evidence cannot have a deterrent effect on officers acting in good faith because they have acted as they did in the belief, albeit mistakenly, that they were acting properly. Again, the proper remedy for aggrieved parties is an action against the entity which hired the offending officer; not, however, against the officer himself, for it would be extremely unfair to punish the officer for his good faith actions, as the law clearly holds. *Hill* v. *Rowland*, 472 F. 2d 1374 (4th Cir. 1973).

What then of the claimed "educational effect" of the Exclusionary Rule upon law enforcement officers? We submit, very little. The complexity and confusion inherent in the law of search and seizure and the long delays involved in court decisions dealing with search and seizure questions (which are themselves often contradictory and confusing) create a "condition of remoteness" on the part of law enforcement officers from the postulated educational effect of the Exclusionary Rule.

Turning to the facts of the instant case, we submit that the opinion of the lower court which compared the action of the Omaha police, in this case, with that of the Baltimore police

in *Lankford* v. *Gelston*, 364 F. 2d 197 (4th Cir. 1966), is unfair. In *Lankford* the police made a dragnet type search of some 300 homes, while in the instant case the Omaha police made a search of four places, each of which had at least a *rational* connection with the individuals being sought pursuant to a valid arrest warrant for the murderer of a police officer.

Next, it seems to us that the fact that the Omaha police officers who went to respondent Rice's house took the time to get a search warrant is conclusive evidence that they were acting in the utmost good faith. They had absolutely no way of knowing that the search warrant, after being sustained by the Supreme Court of the State of Nebraska, would be held invalid by the federal courts. Nor could the police have possibly suspected that, by some inverted process of logic, the hour that it took them to secure the search warrant for Rice's house would be used by the federal courts to destroy the claim of "exigent circumstances" which might have sustained an immediate entry into and search of respondent's house.

Given the obvious good faith of the Omaha police it is obvious that they were not deterred by the Exclusionary Rule when they made the search in question *because they thought they were acting properly*. Nor will an affirmance by this Court of the lower court's decision have much of an educational effect upon future police officers similarly situated given the "condition of remoteness" from this effect based upon the considerations of the complexity of search and seizure law and the time factors which were discussed above.

In summary, we submit that this case presents a vehicle for this Court to modify the Exclusionary Rule to the extent that when the police are acting in good faith and little deterrent purpose will be served, evidence seized should be admissible. Additionally, we believe that if this were done the police of this country would respond positively and would continue their efforts to comply in good faith with the rules which circumscribe their conduct.

If this Court is not of a mind to modify the Exclusionary Rule, as we have urged above, then it should rule that search and seizure claims such as are involved in this case, and which have been definitively decided by state supreme courts should not be cognizible in federal habeas corpus actions under 28 U. S. C. 2254. This entire argument has been clearly set out in the concurring opinion of Mr. Justice Powell in *Schneckloth* v. *Bustamonte*, 412 U. S. 218 (1973). *Amici* do not believe that they can add much to this except to point out that much of the complexity and confusion involved in search and seizure cases stems from the fact that, under 28 U. S. C. 2254, lower federal courts sit as courts of review of state supreme court determinations. Much of this complexity could be resolved by giving some finality to state court determinations.

ARGUMENT.

I. The Exclusionary Rule Should Be Modified to Admit Evidence Obtained by Good-Faith Conduct of the Police Where Exclusion Would Have No Deterrent Effect Upon Such Conduct.

The instant case squarely presents the issue of whether the Exclusionary Rule, mandated as a constitutional rule of criminal procedure by this Court in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), should be modified to admit evidence obtained by good-faith conduct of the police where exclusion of the evidence would have no deterrent effect upon police misconduct.

Amici believe that little of a useful nature will be accomplished by our reiterating in detail all of the arguments, pro and con, about the Exclusionary Rule. No one could be more conversant with such arguments than the members of this Court and the issue has been thoroughly briefed and argued before the Court on at least two prior occasions.[1] We will thus confine our-

1. *California* v. *Krivda*, cert. dismissed as improvidently granted, 409 U. S. 40 (1972); *United States* v. *Robinson*, 414 U. S. 218 (1973), rev'd other grounds.

selves to the argument that, based upon the facts of the instant case and upon considerations of logic and common sense, the Exclusionary Rule should be modified to admit the evidence seized against respondent Rice.

Such an analysis must begin with a brief consideration of the purpose and the basic rationale for the implementation of the Exclusionary Rule by this Court. In *United States* v. *Peltier*, ... U. S. ....., 95 S. Ct. 2313 (1975), in which this Court refused to accord retroactive effect to the prohibition against roving Border Patrol searches enunciated in *Almeida-Sanchez* v. *United States*, 413 U. S. 226 (1973), the purposes of the Rule were characterized as twofold: "the imperative of judicial integrity" and the deterrent purpose of the rule.[2]

The majority of the Court in *Peltier*, however, had no trouble in denying retroactive effect to *Almeida-Sanchez* despite the issue of "judicial integrity" stating that:

> The teaching of these retroactivity cases is that if the law enforcement officers reasonably believed in good faith that evidence they had seized was admissable at trial, the "imperative of judicial integrity" is not offended by the introduction into evidence of that material even if decisions subsequent to the search and seizure have broadened the exclusionary rule to emcompass evidence seized in that manner. ..... U. S. at ....., 95 S. Ct. at 2317.

The *Peltier* opinion went on to state the following which we believe to be apropos to the facts of this case:

> It would seem to follow, *a fortiori*, from the *Linkletter* and *Fuller* holdings that the "imperative of judicial integrity" is also not offended if law enforcement officials reasonably believed in good faith that their *conduct* was in accordance with the law even if decisions subsequent to the search or seizure have held that conduct of the type engaged in by law enforcement officials is not permitted by the Constitution. ..... U. S. at ....., 95 S. Ct. at 2317-2318.

2. ..... U. S. at ....., 95 S. Ct. at 2317-2318.

Concededly, the Court in *Peltier* was addressing itself to the issue of the retroactivity of court decisions and the impact of such retroactivity upon "the imperative of judicial integrity", an issue not present in the instant case; however, we submit that the principle is the same when applied to the facts of this case. If judicial integrity is not offended when the good faith belief on the part of law enforcement officers that their conduct in search and seizure activities was lawful will serve as a bar to the retroactive application of the Exclusionary Rule, such a good faith belief should likewise be held not to offend judicial integrity when the *direct* application of the Exclusionary Rule is called into question.

The Court noted in *Peltier*, that law enforcement officials in such cases as *Linkletter* v. *Walker*, 381 U. S. 618 (1965) and *Fuller* v. *Alaska*, 393 U. S. 80 (1969) could have had no doubt that their conduct was *unlawful;* they merely were unable to foresee the application of the Exclusionary Rule to state criminal trials.[3] Yet retroactivity was denied.

If judicial integrity is not offended when retroactivity of the Exclusionary Rule is denied even in cases of *bad* faith police conduct, it is difficult to conceive that it would be offended even by prospectively banning the application of the rule in cases in which the police are patently acting in *good* faith.

If, then, as we suggest, the "imperative of judicial integrity" would not be offended by the modification of the Exclusionary Rule to the extent that evidence should not be suppressed when the conduct of the police gives every evidence that they believed in good faith that their search and seizure activities were lawful, the question immediately arises as to the second, and most often enunciated, reason for the Exclusionary Rule: The deterrence of unlawful police conduct.

This is the basic question which is involved in any consideration of a modification of the Exclusionary Rule: does it, or does it not, deter unlawful police conduct?

3. ..... U. S. at ....., 95 S. Ct. at 2317-2318.

There is, unfortunately, an extreme paucity of empirical data as to the deterrent effect of the Exclusionary Rule. However, the major study of this which has been made in this country reached the unequivocal conclusion that there is no evidence to support the deterrent effect of the Rule.[4]

Perhaps a more effective way in which the supposed deterrent effect of the Exclusionary Rule can be examined would be to apply simple, common sense principles in order to ascertain whether or not such a rigid prophylactic as the Exclusionary Rule could really accomplish its purported purpose. In order to do this we must examine the state of mind of police officers who are confronted with search and seizure problems, for, obviously, if someone is to be deterred, he must know in his own mind both that he is, indeed, supposed to be deterred from doing something, and what it is that he is supposed to be deterred from doing.

At the outset it must be borne in mind that police officers are not, for the most part, trained in the law. To be sure, the greatest majority of policemen receive some hours of pre-service training, in-service training, or both, in the law of search and seizure and Constitutional law. But when we consider the fact that the law of search and seizure is so amazingly complex,[5] that it is fraught with innumerable variables depending on the given factual situations, and the fact that there are large numbers of court decisions—often conflicting with each other or containing built-in conflicts between concurring and dissenting judges in a single opinion,[6] the conclusion is inescapable that no amount of formal

4. Oaks, "Studying the Exclusionary Rule in Search and Seizure," 37 University of Chicago Law Review, 665 (1970). See also, Spiotto, "Search and Seizure: An empirical Study of the Exclusionary Rule and its alternatives, "I Journal of Legal Studies, (University of Chicago Law School), 243, January 1973.

5. See, *e.g.*, LaFave, "Search and Seizure, The Course of True Law Has Not Run Smooth" 1966 Ill. L. F. 255.

6. For example, Nedrud: "The Criminal Law," a compilation of all of the reported appellate opinions in criminal law and procedure cases, reported, between January 1970 and May of 1975, *3,732* appellate decisions rendered in cases involving only *warrantless* search and seizure cases.

police training is going to be enough to make the policeman sufficiently expert in the law of search and seizure that he will conduct himself flawlessly when confronted with such problems.

To these observations must be added the fact that in many, if not most, search and seizure cases the policeman will have a relatively short amount of time to make his decision as to whether or not to search. The period of time in question may vary from a matter of minutes—for example when a patrolman must decide to stop and search a car that resembles a getaway car in a recent armed robbery; to a matter of about an hour, for example, in the instant case where the police delayed entry into Rice's house for about an hour in order to procure a search warrant; to a matter of hours or even days, as when a major raid is being planned. But in no case will the policeman have the benefit of weeks, months or even years accorded to the courts, especially appellate courts, to review his decision to search.

Finally it must be remembered that most search and seizure decisions are made under the stress of ongoing criminal investigations or other law enforcement activity. We do not argue for a moment that the stresses and pressures of law enforcement can be used to excuse willful or intentional actions by police officers, which deprive citizens of their Constitutional rights. We do argue, however, that such stresses and pressures may, indeed must, be taken into consideration when the state of mind of the police officer is being assessed.

With these three factors in mind—the incredible complexity of the law of search and seizure, the relatively short amounts of time in which an officer has to make a decision whether to search or not, and the pressures involved in the enforcement of the criminal law—we now turn in an examination of the deterrent effect of the Exclusionary Rule upon the targets of the rule: the law enforcement officers themselves.

At the time that a policeman makes the decision which commits him to a given search and seizure he can have two, and only

two, states of mind. First he can know that he has no right to make the given search, *e.g.* that he has no probable cause whatever, that the purpose of the alleged search is purely to harrass the target or that he is making random searches based upon nothing but some sort of vague "hunch". This is the mental condition of *bad faith.*

Second, the officer in question can reasonably believe, *in good faith* that the action that he is taking is lawful, *e.g.* where he has a search warrant, where he reasonably believes that he has probable cause and that a warrant is unnecessary, or where he believes the exigencies of the situation require immediate action to protect himself or others.

How does the supposed deterrent effect of the Exclusionary Rule work on these two states of mind? First, consider the officer who acts in bad faith. The most elementary concepts of logic and common sense dictate that, by definition, the Exclusionary Rule can have no effect whatsoever. The officer acting in bad faith for whatever particular perverse reasons he may have had, has made his search *knowing* that whatever evidence he may turn up will be suppressed.[7] He simply does not care and has obviously not been deterred by the threat of suppression of evidence, illegally seized, because he seized the evidence in the full knowledge that it *would* be suppressed.

The only way that such bad faith conduct can be deterred is by proceeding directly against the errant officer and/or against the municipality or other government entity that hired him. This can be done. Every state has provisions, most sounding in common law tort, for redress of violations of rights of citizens by police officers, and this court has held that questions of illegal searches and seizures by law enforcement officers are cognizable

7. It is of course a basic fact that the "protection" of the Exclusionary Rule extends *only* to those parties who have had evidence of guilt seized from them and then suppressed. For the *innocent* party, aggrieved by an unlawful search and seizure, the suppression doctrine has had no protective effect whatever.

in federal district courts under 42 U. S. C. 1983.[8] Additionally, 40 states have, in some form, waived tort immunity or otherwise made provision for redress to be made to the aggrieved party from the government entity which hired the errant officer,[9] so that, in those states at least, there is a remedy over, not only against the officer but against the government entity involved.

Thus it seems clear that in the case of bad faith police conduct, the Exclusionary Rule has deterred the officer not a whit and the only remedy is and should be, the direct one. No one likes to be sued, not even police officers who act egregiously, and the officer who engages in willful misconduct, while undeterred by the application of the suppression doctrine, will very likely be deterred, either by a direct proceeding against himself, or by knowing that he may very well be faced with dismissal, demotion or suspension because his unlawful activities have resulted in his city or state having to pay a major judgment or settlement to the aggrieved party.

We turn now to an examination of the deterrent effect of the Exclusionary Rule on the officer who makes a decision to search in the good faith belief that he is acting lawfully. This court addressed this issue in the context of confession cases, and, by implication, in the Fourth Amendment cases in *Michigan* v. *Tucker,* 417 U. S. 433, 95 S. Ct. 2357 (1974) with regard to the concept of deterring unlawful police conduct through the sanction of the suppression of evidence, the Court stated:

> Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the

8. *Bivens* v. *Six Unknown Narcotics Agents,* 403 U. S. 388 (1971).

9. See *e.g.,* Section 23-2401, *et seq.;* 81-8. 209 *et seq.* RRS Nebraska 1943. See generally: 1973 Suggested Legislation, Council of State Governments, Iron Works Pike, Lexington, K. Y. 40505, p. 214.

> vagaries of human nature would make such an expectation unrealistic. Before we penalize police error, therefore we must consider whether the sanction serves a valid and useful purpose. 417 U. S. at 446, 94 S. Ct. at 2365.

The Court continued:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent conduct which has deprived the defendant of some rights. By refusing to admit evidence gained as a result of such conduct the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care towards the right of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force. 417 U. S. at 446, 95 S. Ct. at 2365.

The last sentence in the foregoing quotation makes the precise point that we seek to make herein. Unlike the officer who acts in bad faith and who is undeterred because he simply does not *care* whether or not the evidence is suppressed, the officer who acts in good faith is undeterred by the threat of suppression because he reasonably believes that his actions are, in fact, lawful and that therefore the evidence that he seizes will be admissible in court.

For any concept of deterrence to be effective the person to be deterred must know the nature of the sanction which is supposed to deter him (*i.e.* the suppression of evidence), *and* he must know just what it is that he is doing wrong which will invoke that sanction (*i.e.* making an illegal search and seizure).[10] But if the target of the sanction reasonably and in good

10. By way of analogy, this Court has upheld the principle that lower courts may sanction those who disrupt orderly courtroom activity by various means including gagging and/or shackling, by removal from the courtroom, or by contempt citations. *Illinois* v. *Allen*, 397 U. S. 337 (1970), *Mayberry* v. *Pennsylvania*, 400 U. S. 455 (1971). Inherent in these decisions is the fact that the disruptive party, either an attorney or a party to the case, will, hopefully, be deterred by being advised that his contumacious conduct will not be tolerated and, if he persists, that the sanction will follow with reasonable rapidity. This is how a true deterrence concept should work.

faith believes that he is *not doing* anything wrong (*i.e.* that the search and seizure he is making *is* lawful), then the deterrent aspect of the Exclusionary Rule is nil.

Certainly police officers, even those acting in complete good faith, will make mistakes. As this Court stated in *Tucker, supra,* to expect law enforcement officers not to make any mistakes would be highly unrealistic. Our basic legal concept of restitution dictates that when A mistakenly injures B, B should be compensated. If an officer makes a good faith mistake in a search and seizure case, then the aggrieved party should have a right over against the hiring governmental entity. It would, of course, be outrageous to hold an officer *personally* liable for his mistakes which are made in good faith.[11]

Based on the arguments made herein we submit that, logically, the threat of suppression of evidence will deter neither the police officer who acts in bad faith and does not care if the evidence is suppressed, nor the officer acting in good faith who believes that he is acting properly and that the evidence which he has seized will *not* be suppressed.

Our analysis thus far has dealt with the state of mind of the officer when he is about to make one given search and seizure.

11. Recent cases have held that when a police officer believes in good faith that he has probable cause to make an arrest and/or search, *and* his good faith belief is reasonable, then he should not be held liable for his conduct. *Hill* v. *Rowland*, 472 F. 2d 1374 (4th Cir. 1974).

For example, in the facts of the instant case, it would be an unbelievable miscarriage of justice to hold the Omaha police officers personally liable for "illegal" search and seizure when the trial judge and the learned justices of the Nebraska Supreme Court have all put their seal of approval on those police officers activities. *State* v. *Rice*, 188 Neb. 728, 199 N. W. 2d 480 (1972). Our call for sanctions against police officers personally, rather than the suppression of evidence seized, is strictly limited to those cases in which such officers clearly acted in bad faith.

Any such analysis would be incomplete if we did not address ourselves to the so-called "educational effect" of the Exclusionary Rule, that is, whether it is rational to suppose that the body of Exclusionary Rule case law will teach the great majority of law enforcement officers, who wish, in good faith, to act lawfully, just what it is they can and cannot do.[12]

The law of search and seizure is so extensive and comprehensive that few individuals, no matter how learned in the law they might be, could master it entirely, much less a police officer with a high school education. There are so many conflicting opinions in the law of search and seizure that judges sitting on the same court often cannot agree as to whether a given search was or was not lawful; and police officers who are confronted with search and seizure questions are held to different and conflicting standards of conduct by courts sitting in the same geographical jurisdiction—*e.g.* the instant case in which the Supreme Court of the state of Nebraska held the search to be lawful while the federal courts in Nebraska and the Eighth Circuit held it to be unlawful.

Given this complexity and confusion, it stretches the imagination to postulate very much of an "educational effect" of the Rule, even in one locality, much less on a statewide, regional or national level. Even if the law of search and seizure were reasonably finite, which it clearly is not, the targets of the "educational effects" of the Rule are, for the most part fairly far removed from this effect, whatever it may be.

The Chief Justice, dissenting in *Bivens, supra,* has succinctly summed up the question of the remoteness of the police from the Exclusionary Rule law:

> Whatever educational effect the rule conceivably might have in theory is greatly diminished in fact by the realities of law enforcement work. Policemen do not have the time, inclination, or training to read and grasp the nuances of the appellate opinions that ultimately define the standards of conduct that they are to follow. The issues that these decisions raise often admit of neither easy nor obvious answers, as sharply divided courts on what is or is not reasonable amply demonstrate. Nor can judges, in all candor, forget that opinions sometimes lack helpful clarity. 403 U. S. 388 at 417.

12. Of course, no "educational effect" of the Exclusionary Rule will serve any purpose at all insofar as bad faith police conduct is concerned.

The effect of the remoteness of the actual impact of the Rule is illustrated by the facts in the instant case. *Mapp* v. *Ohio, supra,* was decided in 1961; the search in question took place in 1970. Theoretically, the Omaha police had had nine years of education about search and seizure law at their disposal when they entered Rice's house. They entered the house in good faith believing that they were in full compliance with the law, a belief which was sustained by the highest tribunal of their state. Yet two federal courts disagreed and the issue is now before this Court for final disposition. The Omaha police took the action that they did, not because they were *unwilling* to attempt to conduct themselves properly, but because the complexities and contradictions inherent in the law of search and seizure made it impossible for them to be *certain* whether or not they *were* acting properly. Thus the so-called "educational" effect of the rule was of little educational value to the police and of no deterrent effect.

In addition, the time lapse between the instant that a policeman must take action and the ultimate pronouncement as to the legality or illegality of his action by an appellate court further attenuates any "educational effect" of the rule. Again, to quote from the Chief Justice in *Bivens*:

> The presumed educational effect of judicial opinions is also reduced by the long time lapse—often several years between the original police action and its final judicial evaluation. Given a policeman's pressing responsibilities it would be surprising if he ever becomes aware of the final result after such a delay. 403 U. S. 388, at 417.

It is now almost exactly five years since the Omaha police decided to enter Rice's house. Three separate appellate courts have thus far considered their conduct and the highest court in the land will consider it in this case. Thus, even if this Court should affirm in this case, it is difficult to imagine that, after more than five years, such a decision will be much of a "sharp lesson" even to those Omaha police officers who were actually involved in the case at the time, even less to their counterparts scattered across the country.

The point which we are attempting to make here is to underscore the manner in which the *effectiveness* of the "educational effect" of such a decision, and, as a consequence, its potential deterrent effect, can become attenuated by the "remoteness" factor discussed above. First, we have the remoteness of the presumed target of the "educational effect"—the police officer—because of the lapse of time involved and; second, the remoteness of the police officer from any lessons to be learned in a field of law which is for the most part too complex for him to grasp.

Thus, we submit that the Exclusionary Rule, by definition, canot fulfill its primary purpose, the deterrence of unlawful police conduct. It obviously does not deter bad faith police activities, nor does it deter activities by the police taken in the belief that they are acting within the law. Further no long-range educational effects upon the police from the Rule can be reasonably postulated.

Thus far we have argued against the effectiveness of the Exclusionary Rule, as a deterrent to unlawful police conduct, in general terms, dealing with the entire concept of the Rule itself. We turn now to specifics—to the application of the Rule in the instant case, in order to develop our major point further.

Amicus will not reiterate herein the legal arguments set forth by the State of Nebraska to the effect that the entry by the police into David Rice's house was legal (although we agree with these arguments and wish to associate ourselves with

them). However, since our argument is premised in large measure upon our belief that the officers of the Omaha Police Department were acting in the utmost good faith at all times material to the case, we feel that it is necessary to comment briefly on the characterization of the officers' behavior which was made by the lower court.

The panel opinion of the U. S. Court of Appeals for the Eighth Circuit stated that the Omaha police engaged in a:

> widespread search for the suspects Peak and Poindexter which evidenced a negligent disregard . . . for the constitutional rights of not only Peak and Poindexter but possibly other citizens as well. Such a police search is at least reminiscent of the police conduct condemned in *Lankford* v. *Gelaton*, 364 F. 2d 197 (4th Cir. 1966). We believe that this is an appropriate case for the application of the Exclusionary Rule. 513 F. 2d 1280, at 1295.

Amici submit, with all due respect to the judges of the Eighth Circuit, that this is an extremely unfair characterization of the behavior of the Omaha police officers. The police were faced with a situation in which one policeman had been killed and two others injured in a pre-set dynamite bomb ambush; they were legitimately concerned for the security of the community in general, for their own safety and that of others, and for the safety of the suspect Duane Peak for whom they had an arrest warrant.

Despite the obvious exigencies of the situation the police did *not* engage in wholesale, "dragnet" type activities such as those which were condemned by this Court in *Davis* v. *Mississippi*, 394 U. S. 721 (1969). Rather, they confined their search to four locations (one of which was David Rice's house, the search of which is in question here), each of which had at least a *rational* connection with Peak and Poindexter, the two individuals for whom arrest warrants had been issued.

We are at a loss to understand how this relatively narrow-gauged search can even remotely be compared to the situation

in *Lankford* v. *Gelston, supra,* in which the officers of the Baltimore, Maryland, police department made wholesale, house-to-house searches of some 300 persons' homes based upon unconfirmed and anonymous tips. Certainly, the activities of the Baltimore policemen in *Lankford* v. *Gelston* were examples of the sort of truly errant police conduct which we have described in the foregoing part of this Argument. Equally certainly, we submit, the actions of the Omaha police officers in their search for Peak and Poindexter were clear examples of good faith police activity.

We turn now to the actual question involved in this case, the entry and search of David Rice's house. Again, we emphasize that we are not presenting to this court a detailed analysis of the law of search and seizure as applied to this particular search. We are merely attempting to show that the search was made in the utmost good faith by police officers who were confident that they were complying fully with the law at the time they acted as they did. From this it follows that the good faith actions of the officers *could not have been* deterred by the sanctions of the Exclusionary Rule and that it is highly unlikely that any future "illegal" searches and seizures will be deterred by the application of the Exclusionary Rule to this case.

The Omaha police officers, in their search for Peak and Poindexter, arrived at David Rice's house at about 10:00 p.m. on August 22nd, 1970. Now, we believe that it would be permissible to speculate on what was going on in their minds at this time, in order to present the issue of their good faith in its proper perspective:

1. They believed that since Peak was a ranking member of the National Committee to Combat Fascism, as was Rice, and because Peak had been at Rice's house on prior occasions, that he might then be there. (513 F. 2d 1280 at 1284 (8th Cir. 1975)).
2. At least arguably, according to the opinion of the court below, the police had probable cause, *independent of*

their search for Peak, to search Rice's home. (513 F. 2d 1280 at 1286 (8th Cir. 1975)).

3. From the foregoing facts it is obvious that the arrival of the police at Rice's house was no random happening, no part of any sort of house-to-house, dragnet-type search, but that they had a very legitimate reason for being there.

What then, did the police do? They waited for about an hour at Rice's house in order to secure a search warrant.

What does this indicate about the state of mind of the police at David Rice's house prior to entry? It indicates their absolute good faith beyond any question for the following reasons:

1. *They took the time to obtain a search warrant.* If there is *any* fairly finite rule which may be gleaned from the incredibly complex mass of search and seizure law discussed above, it is that in our system there is a preference for and a high priority placed on the procuring of search warrants before a search is made. *United States* v. *Ventresca,* 380 U. S. 102 (1965); *Katz* v. *U. S.* 389 U. S. 347 (1967). This is what the Omaha police did, and if this action is not conclusive of the good faith of the Omaha police department then it would be almost impossible to prove good faith in *any* search and seizure case.
2. *There was no way for the police even to suspect that their search warrant would later be held to be invalid.* The search warrant for Rice's house was duly issued by a magistrate and was "fair on its face" (*i.e.* there were no patent defects such as a wrong address or that it was issued by a judicial officer without jurisdiction, etc.). Further, in retrospect, the same search warrant was sustained by the trial court and the Nebraska Supreme Court judges whom we must presume are more learned in the law of search and seizure than are

Omaha police officers.[13] Thus there is simply no possibility that the Omaha police officers could have suspected for a moment that they were executing what would later be held to be an invalid piece of process.

3. *It is inconceivable that it would even have remotely occurred to the officers that their taking the necessary hour to secure the search warrant would later be used to destroy the claim that, despite the subsequent invalidity of the warrant, they could have made a lawful warrantless entry and search, at the time they arrived at Rice's house based on the doctrine of "exigent circumstances."* The Omaha police certainly did not take the time to get a search warrant for Rice's house in order to *violate* Rice's rights. Obviously they secured the warrant in order to *protect* his rights. This procedure took about an hour, yet the federal courts ruled, in effect, that, while the warrantless search might have been permissible had the police immediately entered David Rice's house when they got there, the hour that it took the police to secure the warrant vitiated any such a claim. Had the police known this, or even considered their situation in this light, they would, again in complete good faith, have entered Rice's house as soon as they arrived there.

Thus we see the hapless Omaha police department officers whose good faith attempt to act within the confines of the law is about as clear as anything could be, and whose conduct was sustained by their state supreme court, being faced with a review of their conduct by the federal courts which can be characterized as hypertechnical at the very least.

13. Amici concur with the position taken by the State of Nebraska and the Nebraska Supreme Court that, in the circumstances of this case, the search warrant was indeed a valid warrant. *United States* v. *Harris*, 403 U. S. 473 (1971).

In view of the foregoing, what will be the result if the Exclusionary Rule is held by this court to require suppression of the evidence seized from the house of David Rice?[14]

First, an individual who has been convicted of the ambush murder, by dynamite, of an Omaha police officer, and against whom the evidence was overwhelming, will almost assuredly, have to be freed.

Next, the Omaha police officers involved in the search for and seizure of the evidence against Rice will not be punished or deterred in the slightest. They know that they exercised the utmost good faith in attempting to comply with the law, and their value judgments, made at the scene, were sustained by their state Supreme Court, only to be overturned by two federal courts.[15]

The Omaha police may indeed feel *frustrated*. They may ask one another just how, in the circumstances of this case, or in similar cases, they are to go about their duty of protecting the community and themselves; but it is highly unlikely that they will feel chastened or punished by the decision.

Finally, and most importantly, the suppression of the evidence in this case will not serve as some sort of shining beacon to deter future police "misconduct" (if that term can even be used to describe the law enforcement activity in the instant case).

Many police officers will never hear of the case. Even for those that do, the "Rice" case will become another increment in an ever-growing body of law whose complexity, almost by

14. For purposes of brevity we will not discuss the question of the admissibility in evidence of the dynamite particles found in Rice's clothes, because the suppression of this evidence stems directly from the search of his house, which question we have addressed ourselves.

15. In fact, if the Omaha police learn any lesson at all from the suppression of the evidence in this case, that lesson may well tell them to proceed at once, in similar cases, *without* a warrant since their efforts in this case to comply with the law, by obtaining a search warrant, backfired against them by destroying the exigent circumstances argument to justify the search.

definition, makes either an educational effect or a deterrent effect upon the police speculative at best.

This is not to say that the police are going to engage in a concerted course of conduct designed to ignore or to flout the teachings of this Court. It simply means that, the great majority of police officers will not be deterred from taking "illegal" actions when they have no real way of knowing whether their activities are, in fact, "illegal". They will continue to go about their duties, for the most part in good faith, attempting to enforce the criminal law in compliance with what they understand in *very general terms* to be the state of the law which governs their conduct. Most of the law enforcement officers in this country take the view of their jobs which was characterized by Mr. Justice Clark, dissenting in *Chapman* v. *United States*, 316 U. S. 610 (1961):

> Every moment of every day, somewhere in the United States, a law enforcement officer is faced with the problem of search and seizure. *He is anxious to obey the rules that circumscribe his conduct in this field.* 316 U. S. 610 at 622 (emphasis supplied).

We believe that this characterization is accurate. If the police of this country perceive that the courts are taking a realistic attitude towards their problems in dealing with the all too undeniable rise of crime and violence in this country, the police will in turn respond in a responsible and positive manner by conducting themselves as professionally as possible.

As an illustration of this we cite the instance of the response of law enforcement officers to this Court's holding in *Terry* v. *Ohio*, 392 U. S. 1 (1968), that policemen may "stop and frisk" persons in public places who are reasonably suspected of actual or imminent criminal conduct. After *Terry* was decided in 1968 some 3½ years elapsed before this Court was again confronted with another "stop and frisk" case, *Adams* v. *Williams*, 407 U. S. 143 (1972).

One of the *amici*, herein, Americans for Effective Law Enforcement, Inc., filed a brief, *amicus curiae*, in *Adams* v. *Williams* in which we pointed out that, in the years which had transpired between *Terry* and *Adams*, appellate court review of "stop and frisk" cases indicated that no sort of pattern of wholesale police misconduct, pursuant to their newly-granted "stop and frisk" authority, had developed.

We believe that the same considerations are pertinent to our argument herein, *i.e.*, that the police will respond in a responsible and professional manner when the courts are willing to consider the problems facing such officers in their efforts to enforce the criminal law. We therefore quote in this case the argument made by Americans for Effective Law Enforcement, Inc., as *amicus curiae* in *Adams* v. *Williams*:

> In *Terry* v. *Ohio*, the opponents of the stop and frisk procedure argued that the doctrine of stop and frisk would be "judicial abdication to police judgment," and that the courts could not control the procedure since an officer "may always 'reasonably suspect' he is in danger." However, a review of state and federal stop and frisk cases decided on the appellate level during the years 1969, 1970, and 1971 indicates that these dire forebodings did not materialize into facts.
>
> The source of our review of these cases was Nedrud: The Criminal Law[17] (hereafter referred to as Nedrud), a collection of reported appellate criminal law cases which is published as a service for attorneys and others interested in the criminal law which classifies and digests cases of importance in this area. This publication lists: "Detention, Stop and Frisk" as a separate category of cases taken from federal and state reporters. During the years 1969, 1970, and 1971, Nedrud digested 272 cases in the stop and frisk category. Of the 272 cases digested 222 opinions upheld the particular police procedure involved as proper.

17. Nedrud, The Criminal Law, by Duane R. Nedrud and Marguerite D. Oberto. LE Publishers, 612 N. Michigan Avenue, Chicago, Illinois 60611. Volumes for 1969, 1970, and 1971. Sec. A.1.4 "Detention, Stop and Frisk."

In only 50 cases did the courts find that stop and frisk procedures were violative of the Fourth Amendment's guarantee against unreasonable searches and seizures.

These figures, we submit, indicate an extremely high level of proper, non-abusive law enforcement, particularly when it is considered that 1) the police were dealing in a relatively newly defined area of the law enforcement process and 2) most stop and frisk confrontations are made on the spur of the moment in which a police officer has very little time to engage in lengthy considerations about the propriety or impropriety of his acts.

Further, of the fifty cases which were decided against the police, in seventeen of them the courts actually upheld the stop and the initiation of the frisk but ruled the evidence obtained inadmissable because of the *scope* of the frisk. Thus in the final analysis, of the two hundred and twenty-two cases digested in Nedrud, only thirty-three were held to be cases in which the *entire* officer-suspect confrontation was considered to be improper. This produces a ratio of almost 7-1 in favor of police procedures in the stop and frisk area which were sustained.

We believe the same rationale to be applicable to this case. If this Court should hold that, in the facts of this case, evidence which is highly probative and reliable as to the guilt of the defendant should not be excluded, when the police were acting in good faith and where there will be little or no deterrent effect of the exclusion, the police would not utilize this modification of the Exclusionary Rule as an excuse to engage in any sort of concerted conduct of unlawful behavior.

The Chief Justice, in his dissenting opinion in *Bivens, supra,* summed up succinctly the entire issue of the continued viability of the Exclusionary Rule:

> Some clear demonstration of the benefits and effectiveness of the Exclusionary Rule is required to justify it in view of the high price it exacts from society—the release of countless guilty criminals.[18]

18. Bivens, *supra,* at 416.

The only possible "benefit" of the Exclusionary Rule would be that it effectively deterred unlawful police conduct. Even if it *could* be proven that the Exclusionary Rule did so, there could still be a legitimate debate over whether or not even *this* compensated for the "high price it exacts from society" by requiring the release of patently guilty criminals. We submit, however, that logically the Exclusionary Rule does not now, will not in future, and simply *can not* deter unlawful police conduct. Thus the Exclusionary Rule will continue to exact its high price from society with little or no corresponding benefit of any kind except to the guilty criminal.

This case presents this Court with a sound factual basis upon which to evaluate the continued validity of the Exclusionary Rule. We urge the Court to confront the issue squarely and to hold that, at least in cases such as this where complete good faith on the part of the police is shown, and, where there is little or no possibility of any deterrent effect of the application of the Exclusionary Rule, the Rule should be modified, and the opinion of the lower court should be reversed and the evidence seized from respondent Rice should be held to be admissible against him.

II. This Court Should Hold That the Constitutional Validity of the Entry and Search of Respondent's Premises by Omaha Police Officers Under the Circumstances of This Case Is Not a Question Properly Cognizable Under 28 U. S. C. 2254.

This question has been thoroughly covered by the concurring opinion by Mr. Justice Powell in *Schneckloth* v. *Bustamonte,* 412 U. S. 218 at 249. We see no necessity to repeat either the telling legal arguments or the lucid intellectual arguments set forth by Mr. Justice Powell to the effect that the scope of federal habeas corpus review of state criminal convictions should be limited only to those cases in which there is doubt as to the guilt of the petitioner.

We wish to add one brief thought to the arguments made in Justice Powell's concurring opinion in *Schneckloth*. We have attempted to make the point in the foregoing section of this argument that the Exclusionary Rule cannot be an effective deterrent to police misconduct in the search and seizure area. One of the main arguments in support of this point is that the law of search and seizure as applied to the police is so totally complicated, conflicting and confusing that the persons whom the Rule is supposed to deter simply cannot *know* what it is that they are to be deterred from doing.

Much of the complexity, contradiction, and confusion which confront the police in search and seizure questions stems from the fact that even when a given state supreme court makes a definitive pronouncement as to the legality of a certain search and seizure, that determination is now still open to reversal by a single federal judge sitting in review of the determination in a federal habeas corpus proceeding, or on occasion by that judge and, usually, a three-judge panel of a federal circuit court of appeals.

This bifurcated system of review can have no other result but to contribute in a major manner to the confusion of the situation. This has been succinctly pointed out in the *amicus curiae* brief submitted in this case by the State of Arizona, in which the cases of *State* v. *Kasold*, 110 Ariz. 558, 521 P. 2d 990 (1974); 110 Ariz. 563, 523 P. 2d 995 (1974) are discussed. In *Kasold*, after review of the case by three levels of the state judiciary, including the Arizona supreme court, a federal court reversed the findings of the state courts and held that the search and seizure was illegal.

The State of Arizona in its *amicus* brief in this case, rather eloquently presents the position of law enforcement on this issue. Referring to the holding of the federal district court suppressing the evidence in the *Kasold* case, the Attorney General of the State of Arizona stated:

> The result is clear: in a case such as Kasold's it is the opinion of one United States District Judge which counts.

> Decisions of state courts are of no import; appeals in the federal system are futile. The district judge may as well be the magistrate to whom *all* search applications are submitted because his is the ultimate decision. (Emphasis added.)

We concur with this evaluation entirely and point out further, the confusing effect that this uncertainty can have upon the ordinary policeman on the street.

If this court is not minded to confront the issue of the Exclusionary Rule which we urge in part I of this argument, it could make a major stride towards eliminating much of the confusion and complexity for state law enforcement officers involved in the law of search and seizure by holding that final state court decisions on such issues should not be cognizable in a 28 U. S. C. 2254 action unless the question is one of the actual guilt or innocence of the party.

CONCLUSION.

The Exclusionary Rule does not deter unlawful police conduct. This is the primary rationale for the Rule but it has no basis in fact or in logic. The Exclusionary Rule extracts a supremely high price from society by requiring the freeing of countless guilty criminals. This Court should modify the Exclusionary Rule to the extent that, as in the facts of this case, when the police are acting in complete good faith and the suppression of evidence will serve little or no deterrent purpose, evidence seized from a criminal defendant should be admissible against him.

In the alternative this Court should hold that when a state supreme court has made a definitive ruling as to the legality of a given search and seizure, and where the guilt of the defendant

is not in question, such cases should not be cognizable by lower federal courts under 28 U. S. C. 2254.

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